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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

HARRY JESSUP, an individual, and WESTMORELAND RECREATION SOCIETY, INC., a Pennsylvania non-profit corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

WHETHER A NOTICE OF APPEAL EXECUTED AND FILED BY A PRO SE LITIGANT WHO IS THE PRESIDENT AND MAJORITY SHAREHOLDER OF A NON-PROFIT CORPORATION IS EFFECTIVE TO GIVE JURISDICTION TO A UNITED STATES COURT OF APPEALS TO REVIEW AN ORDER DIRECTING THE SALE OF REAL PROPERTY THE LEGAL TITLE TO WHICH IS IN THE NAME OF THE NON-PROFIT CORPORATION WHERE THE PRO SE APPELLANT INDIVIDUALLY OWNS NO INTEREST IN THE PROPERTY AND FAILS TO NAME THE NON-PROFIT CORPORATION AS THE APPELLANT?

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OPINIONS BELOW

On January 20, 1988, the United States District Court for the Western District of Pennsylvania (Weber, J.) entered a forfeiture order pursuant to 21 U.S.C. §§ 848(a) & 853, directing that certain real property owned by Petitioner Westmoreland Recreation Society, Inc. be sold to recover $223,100 plus costs for the benefit of the United States. The Opinion and Order of the United States District Court for the Western District of Pennsylvania are unpublished and are reproduced as Appendix "A" to this Petition.

On July 24, 1988, the United States Court of Appeals for the Third Circuit

entered a Judgment Order, dismissing an appeal which Harry Jessup, President and majority of shareholder of Westmoreland Recreation Society, Inc., had filed pro se from the above forfeiture order. The unpublished Judgment Order is reproduced as Appendix "B" to this Petition.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Pennsylvania had jurisdiction pursuant to 21 U.S.C. §853(n)(2).

The United States Court of Appeals for the Third Circuit had jurisdiction to review the forfeiture order of the District Court pursuant to 28 U.S.C. §1291.

The United States Court of Appeals for the Third Circuit entered the Judgment Order sought to be reviewed on July 28, 1988. This Court has jurisdiction to review the Judgment Order of the United States Court of Appeals for the Third Circuit by petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS/RULES INVOLVED

Federal Rule of Appellate Procedure 3(c):

> "(c) Content of Notice of Appeal. The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal."

STATEMENT OF THE CASE

One Ernest G. Rockwell (not a party to this proceeding or appeal) pleaded guilty on July 17, 1985 to engaging in a continuing criminal enterprise involving trafficking in narcotics . United States v. Ernest G. Rockwell, Crim. Action No. 85-156 (W.D. Pa.). As part of a plea agreement with the United States, Rockwell agreed to forfeit any interest he had acquired in certain property, including a parcel of real estate in Westmoreland County, Pennsylvania known as "Indian Lake Park."

Indian Lake Park is a mountain site consisting of approximately 16 acres located in North Huntingdon Township, Westmoreland County, Pennsylvania,

including a mountain lake and various improvements. In 1974 petitioner Harry Jessup purchased the property with the intent to convert the site into a recreation area.

At the time of the purchase, there was only one structure on the site: a one-story concrete block shell. Jessup soon learned that a local ordinance prohibited the erection of more than one structure on the site, although that local ordinance apparently did not apply to property owned by non-profit organizations. In order to bring his idea of a recreation area to fruition, Jessup in 1976 created a non-profit corporation, Westmoreland Recreation Society, Inc. Jessup has been the President and majority shareholder of

the non-profit Society since its inception.

On May 2, 1986, the United States filed an order in the United States District Court, seizing the real property known as Indian Lake Park pursuant to 21 U.S.C. §853 as property acquired by Rockwell from the proceeds of narcotics crimes.

Petitioners Harry Jessup and the Westmoreland Recreation Society, Inc., then represented by counsel, petitioned to intervene pursuant to 21 U.S.C. §853(n)(2), claiming a superior title to Indian Lake Park. After a hearing as provided by 21 U.S.C. §853(n), the District Court on January 20, 1988, granted the Government's forfeiture petition and ordered the forced sale of Indian Lake Park, with the United

States to recover from that sale the amount of $223,100, plus costs, representing the amount of illicit funds the Court found Rockwell to have spent improving the real estate of Westmoreland Recreation Society, Inc. The Order provided that any balance remaining from the proceeds of the sale should be paid to Westmoreland Recreation Society, Inc.

Petitioner Harry Jessup then filed a timely pro se appeal with the United States Court of Appeals for the Third Circuit. Although the Third Circuit initially questioned whether the notice of appeal was timely filed and requested that the parties submit memoranda, the Government conceded that the appeal was timely. The parties then submitted briefs on the merits and

the Third Circuit scheduled oral argument for July 27, 1988.

One week before schedule oral argument, the Third Circuit requested that parties be prepared to discuss at oral argument the recent decision of this Court in Torres v. Oakland Scavenger Co., ____ U.S. _____, 56 U.S.L.W. 4740 (June 24, 1988). Oral argument was then held on July 27th.

The Third Circuit, on July 28, 1988, issued a Judgment Order dismissing for want of jurisdiction the pro se appeal of Petitioner Jessup on the authority of Torres v. Oakland Scavenger Co. The Third Circuit indicated in its Order that because the legal owner of the forfeited real property was Westmoreland Recreation Society, Inc. and because the pro se notice of appeal

named Harry Jessup as the appealing party, it lacked jurisdiction to review the District Court's forfeiture order.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Honorable Court should grant the Petition for Writ of Certiorari on the ground that a conflict exists between the decisions of this Court in Torres v. Oakland Scavenger Co., ___ U.S. ____, 56 U.S.L.W. 4740 (June 24, 1988), and Houston v. Lack, ___ U.S. ____, 56 U.S.L.W. 5428 (June 24, 1988). Where an apparent conflict exists between decisions of this Court, this Court is the only forum in which a definitive resolution can be obtained.

In Torres a litigant, represented by counsel, filed a notice of appeal naming himself (but not Torres or fourteen other intervening parties) as the appellant. The litigant filing the notice of appeal in Torres was a party

in the trial court, did have appellate rights, and the Court of Appeals therefore adjudicated the appeal. Torres, who had not been named as an appellant, then sought to take advantage in the trial court of the favorable decision on the earlier appeal.

This Court, applying F.R.A.P. 3(c), held that Torres was not a party to the earlier appeal in which he had not been named as an appellant. That Rule provides:

> "The notice of appeal shall specify the party or parties taking the appeal ..."

This Court observed that Torres was simply not named in the notice of appeal "however inartfully." 56 U.S.L.W. at 4741.

In Houston v. Lack, this Cour
the same day that Torres was dec
held sufficient to invoke the appe
jurisdiction of a Court of Appe
pro se notice of appeal which wa
filed "with the Clerk of the Dis
Court ..." as required by F.R
4(a)(1). This Court in Houston v.
followed a line of prior cases
had interpreted notice of appeal f
requirements liberally in c
involving pro se litigants. See,
Fallen v. United States, 378 U.S.
(1964); Foman v. Davis, 371 U.S.
(1962).

The instant case is so factu
distinguishable from Torres that
apply Torres and to ignore Housto
Lack, Fallen v. United States,
Foman v. Davis is to de

substantially and erroneously from the mandate of F.R.A.P. 3(c) that an appeal not be dismissed "for informality of form or title of the notice of appeal" and to work unfairness upon the petitioner and all other pro se litigants similarly situated.

Petitioner Harry Jessup, at the time he filed a notice of appeal below, was proceeding pro se. As an individual, he had no stake whatever in the forfeiture ordered by the District Court. His only interest in the matter was as President and majority shareholder of a Pennsylvania non-profit corporation, Westmoreland Recreation Society, Inc., which technically owned legal title to Indian Lake Park. Rather than designate the

Westmoreland County Recreation Society as appellant, he designated himself.

The mistake made by Petitioner Jessup is a common and understandable error by a lay litigant. The distinction between individually-owned property and corporate-owned property is one not likely to be well-grasped by the lay litigant. That mistake, however, had no effect whatever on the other party to the appeal, the United States, or on the Court of Appeals, nor did that mistake in any manner frustrate the purposes of F.R.A.P. 3(c).

The differences between the instant case and the situation in Torres make the Torres decision inapplicable here.

In Torres, the litigant who filed the notice of appeal and who did not

name Mr. Torres as an appellant was himself a party with interests of his own at stake in the litigation. The Court of Appeals adjudicated the appeal. In the present case, however, it is clear that Mr. Jessup has no legal interest, as defined by state law, in the title to Indian Park Lake; that interest is owned entirely by Westmoreland Recreation Society, Inc., a non-profit corporation of which he is the majority shareholder and President and which is under his control. The Torres holding results only in a refusal to permit a prior appeal taken by another litigant and which was adjudicated to redound to the benefit of a person not named in notice of appeal. Torres applied here, however, results in the conclusion that the

notice of appeal filed by Mr. Jessup is a total nullity, because it brings before the Third Circuit an appeal by a person who has no rights which can be adjudicated by the Third Circuit.

The Torres decision does not stand for the proposition that a notice of appeal should be interpreted as a nullity and of no effect whatever. The converse should be true: a notice of appeal should be interpreted as bringing before the Court of Appeals rights of a litigant with a stake in the litigation, here Westmoreland Recreation Society, Inc.

Another important distinction between Torres and this case is that in Torres the appellant had no authority, by agency, ownership, or otherwise, to represent Mr. Torres as an appellant.

There was, therefore, no reason to read a notice of appeal which did not name Torres as an appellant as including Torres. Here, however, Mr. Jessup indisputably is the majority shareholder, President and controlling voice of Westmoreland Recreation Society, Inc. There is, therefore, reason to interpret a notice of appeal filed by Jessup as invoking the appellate rights of Westmoreland Recreation Society. Clearly, Jessup intended the notice of appeal to have some effect, there is only one litigant, Westmoreland Recreation Society, Inc., with legal rights at stake, and Jessup indisputably has the legal power to invoke the rights of that litigant. He should be regarded as having done so.

Another significant difference between Torres and this case is that in Torres other parties could legitimately claim that they did not know or understand that Mr. Torres had been a party to an earlier appeal in which he was not named on the notice of appeal. In Torres, permitting a notice of appeal to encompass Mr. Torres would have engendered considerable uncertainty and confusion with respect to the identity of parties-appellant.

In this case, however, there has never been any risk of confusion. The Government understood that an appeal had been taken from an order forfeiting 16.2 acres of real property which was owned by Westmoreland Recreation Society, Inc., and the Government argued that forfeiture on the merits.

It was not until the Court of Appeals called Torres to the attention of the parties that the Government became aware that there was any argument that could be made with respect to the sufficiency of the notice of appeal to invoke the rights of the owner of the Indian Lake Park real property.

In Fallen v. United States, 378 U.S. 139, 142 (1964), this Court wrote that procedural rules are "not intended to be [] a rigid code to have an inflexible meaning irrespective of the circumstances." In Foman v. Davis, 371 U.S. 178 (1962), this Court held that since both parties had briefed the issue and petitioner's intention to appeal was manifest, petitioner's notice of appeal would be deemed effective. The holding of Foman v.

Davis is squarely on point and should have controlled the decision of the Third Circuit. As Advisory Committee Notes on Rule 3 indicate, "an appeal should not be dismissed for informality of form or title of the notice of appeal." The result reached by the Court of Appeals, however, is in direct disregard of Foman and the mandate of F.R.A.P. 3(c) that "[a]n appeal ... not be dismissed for informality of form or title of the notice of appeal."

On the same day that Torres was decided, this Court handed down a decision in Houston v. Lack, ___ U.S. ___, 56 U.S.L.W. 5428 (June 24, 1988). In that case, a pro se notice of appeal was held sufficient, even though it indisputably had not been filed with the Clerk of the District Court as

required by F.R.A.P. 4. This Court held that: "The litigant has complied with the Rule if a litigant's action is the functional equivalent of what the Rule requires." 56 U.S.L.W. at 5428.

Petitioner Jessup may not be, in technical form under Pennsylvania law, the Westmoreland Recreation Society, but as President and majority shareholder and with power to act on behalf of the Society, he is a proper party, indeed the only party to appeal on behalf of the Society. In N.A.A.C.P. v. State of Alabama, 357 U.S. 449 (1958), this Court held that a litigant had "standing" within the meaning of Article III to raise the rights of another not immediately before the court where those rights could otherwise not be effectively

represented 357 U.S. at 449. So it is here. The rights of Westmoreland Recreation Society can only be represented by Petitioner Jessup, he has "standing" to raise those rights, and F.R.A.P. 3(c) cannot be read to nullify that fact. Jessup is a person who has a real, personal stake in the outcome of this litigation, and that interest supports "standing" and supports Jessup's attempt to raise the rights of his corporation. Baker v. Carr, 369 U.S. 186 (1962).

CONCLUSION

For the foregoing reasons, Petitioners Harry Jessup and Westmoreland Recreation Society, Inc. pray that this Court grant the Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Third Circuit.

DATED: September 23, 1988

Respectfully submitted,

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ATTORNEYS
FOR PETITIONERS

CERTIFICATE OF MEMBERSHIP IN THE BAR

I, Robert L. Potter, hereby certify that I am a member of the Bar of this Court.

_____

Robert L. Potter

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal Action No. 85-156
v.	)	
ERNEST G. ROCKWELL	)	

O R D E R

AND NOW in accord with the accompanying Opinion it is hereby ORDERED:

1) That the parcel known as Indian Lake Park, that is that area circumscribed by the perimeter fence, is subject to forced sale to permit the United States to recover the sums

described below.

2) That the United States is to recover from the proceeds of said sale the amount of $223,100 being the investment of Ernest Rockwell which was forfeited pursuant to 21 U.S.C. § 848(a) and § 853.

3) That the United States is to recover from the proceeds of said sale the amount of costs incurred by the United States Marshal's Service in seizing and maintaining the property.

4) Any balance remaining from the proceeds of said sale after recovery by the

United States of the forfeit interest and costs shall be paid to the Westmoreland Recreation Society, Inc.

SO ORDERED this 20th day of January, 1988.

GERALD J. WEBER
United States District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal Action No. 85-156
v.	)	
ERNEST G. ROCKWELL	)	

O P I N I O N

WEBER, D.J. January 20, 1988

In this criminal forfeiture proceeding, third parties have asserted an interest in the subject property. The matter was tried to the court and we have received briefs.

FACTS

On July 17, 1985, Ernest Rockwell pled guilty to one count of tax evasion and a charge of engaging in

a continuing criminal enterprise involving illegal trafficking in narcotics, in violation of 21 U.S.C. § 848(a). Rockwell has subsequently testified as a government witness in several criminal prosecutions of his former narcotics associates.

As part of the pleas agreement, Rockwell forfeited any interest in property procured with drug proceeds, specifically including all right, title and interest in Indian Lake Park.

Indian Lake Park is a mountain site consisting of approximately 16 acres, a mountain lake and various improvements. In 1974, Harry Jessup, a petitioner here, executed a sales agreement with the then-owners whereby Jessup would pay a total of $47,000 in several annual installments in order to

acquire title to the property.

When the sales agreement was executed in 1974 there was only one structure on the site, a 1-story concrete block shell. After the execution of the sales agreement, but before transfer of the title, Jessup began making further improvements to the property.

According to Jessup, his purpose has always been to convert the site into a recreational park providing boating, fishing, picnicking and family amusements. To this end he began making improvements to the site, including the erection of various structures.

Jessup quickly ran into a snag. A local ordinance prohibited the erection of more than one structure on

the site. However, the ordinance apparently did not apply to non-profit organizations, and so in 1976 Jessup created the Westmoreland Recreation Society, Inc., a non-profit corporation registered with the Commonwealth and having as its stated purpose the preservation and development of the natural resources of Indian Lake Park. Harry Jessup was and is president and principal shareholder in the Society.

The sales agreement was assigned to the Society, and ultimately, when the last installment payment was made by Jessup, the deed was transferred to the Society. Under the auspices of this non-profit corporation, Jessup continued to make improvements in the site, mostly in the erection of various structures,

including offices, picnic pavilions, garages, a concession stand, and a modular chalet. All these structures were erected prior to Rockwell's initial involvement in August, 1983.

By Jessup's own admission, these various improvements were made with a minimal cash outlay. the structures were constructed almost entirely of used material, obtained by a demolition and salvage business which Jessup ran. The labor was mostly Jessup's, with assistance provided by unpaid volunteers. Improvements to the lunge were made by a third party at no cost to Jessup, and Jessup acquired full title to all those improvements when that party defaulted on the lease. Other expenses were paid out of money which Jessup claims was a gift from a

third party for use on the park.

In August 1983, despite the various structures erected, the Society was no closer to opening as the envisioned amusement and recreational park. Neither the lounge nor the concessions were open, and many of the structures remained unfinished. There was no means of transporting persons from the park entrance to the various facilities, and no fence to restrict access to the site.

At that time Jessup was seeking investors who would bring money to the project. In August 1983 he was introduced to Ernest Rockwell who expressed interest in being the bankroll for the project.

Although the park as a whole required considerable work, it was

agreed that the focal attraction was to be a large waterslide of the type now popular at many amusement parks. With Rockwell's money, work began in earnest. A slide was purchased and much of it delivered to the site. A topographical survey of the waterslide site was performed, and a bathhouse, deck, splashdown pool, walks, fencing and the support pillars for the slide were constructed. It is not disputed that all the improvements at the one acre waterslide site were paid for by Rockwell.

It is also undisputed that Rockwell paid for other improvements outside the one acre waterslide site. Most notable was the erection of a fence around the perimeter of the entire 16 acre site. Such a fence is

of course a necessity to a venture which seeks to charge admission. Rockwell also paid for concrete floors in 1 or 2 buildings erected by Jessup which until that time had dirt floors. In addition, Rockwell claims to have paid for other improvements outside the waterslide site which Jessup denies.

Rockwell has testified that he invested $357,00 in Indian Lake Park in the period between August 1983 when he met Jessup and December 9, 1984 when he went to jail. Rockwell claims he was to be an equal partner with Jessup in the park. Jessup on the other hand estimates Rockwell's total investment at $170,000 and contends that Rockwell's interest was limited to a 10 year lease on the waterslide and a 50% share of the waterslide profits. These

discrepancies form the core of this case.

After Rockwell's guilty plea, on the basis of certain admissions of Rockwell, we conclude that Rockwell had invested the proceeds of a continuing criminal enterprise in the park and his interest int he park was therefore subject to forfeiture under 21 U.S.C. § 848(a) and § 853. Pursuant to the court's order the United States Marshal seized the subject site.

Jessup and the Society filed a timely petition to vacate the seizure order, asserting right, title and interest superior to Rockwell's. While petitioners do not deny that Rockwell invested money in the park, or that the money was the proceeds of drug trafficking, petitioners dispute the

amount which Rockwell claims to have invested, and the scope of that investment in relation to the park as a whole. In this manner petitioners seek to limit the amount to be forfeited.

A hearing on the petition was held, at which time both sides presented evidence of the relative investments of the principals. On the basis of that record we now address the issues raised by the petition.

DISCUSSION

A person convicted of engaging in a continuing criminal enterprise under 21 U.S.C. § 848(a) will find certain of his property subject to forfeiture under 21 U.S.C. § 853. In the present case defendant Rockwell admitted that he invested drug proceeds in Indian Lake Park and accordingly

this court ordered the forfeiture of his interest.

In such forfeiture proceedings, a third party may assert a legal interest in the subject property in the manner prescribed by 21 U.S.C. § 853(n). Evidence on the third party's claim is to be taken by the court without a jury, 21 U.S.C. § 853(n)(2), and both the petitioner and the government have the opportunity to present evidence and to cross examine opposing witnesses. 21 U.S.C. § 853(n)(5).

In such proceedings, the 5petitioner bears the burden of proving by a preponderance of the evidence that he has superior title in the subject property, or that he is a bona fide purchaser for value who brought without

knowledge that the property was subject to forfeiture. 21 U.S.C. § 853(n)(6). In the present case, the petitioners do not purport to be bona fide purchasers who bought from Rockwell, but rather assert that they had prior and superior title in the property. They also seek to minimize both the scope and amount of Rockwell's investment.

We first address the dispute over the dollar amount of Rockwell's investment. Rockwell recalls a total investment of $357,000 while Jessup estimates it at $170,000, but neither man has much supporting documentary evidence.

All receipts for work done at Rockwell's expense were destroyed by Rockwell, with Jessup's knowledge, after Jessup received a grand jury

subpoena. The receipts were destroyed to keep them from the hands of the Grand Jury. Jessup admits he kept no record of expenses nor any log of Rockwell's many cash contributions. Jessup's estimate is based solely on his recollection.

Rockwell has produced a looseleaf binder which he claims contains a tally of his investment in the park. According to Rockwell he maintained a running total of the cash he gave to Jessup for the park, entering the amount of each installment, adding it to the current total, and entering the updated total. When these tabulations filled a page, Rockwell would transfer the current total to the top of the next page and discard the just completed page.

Rockwell claims that page 1 in this binder is the last page of the running total of his investments in Indian Lake Park. There is a figure of $309,000 at the top of the page and various amounts are then added, producing successive totals, culminating in the amount of $328,100 at the base of the page. A notation appearing next to one of the amounts added to the running total reads "end of fencing, fuel & cylinders." This notation is consistent with the indisputed fact that Rockwell paid for fencing, the waterslide supports (i.e., cylinders) and construction expenses, (i.e., fuel for construction machinery), among other things. This page thus appears to be what Rockwell claims it to be, a running tabulation

of his investment in the park.

Rockwell claims his total investment to be $357,000, but he can produce no supporting evidentiary material for that figure. The second page in the binder is of no import: it is not in the form of a running tabulation like page 1; when added to page 1's total it does not total $357,000, and Rockwell could not identify the figures on page 2 as representing park investments. In the absence of supporting evidentiary material, we cannot accept a figure for Rockwell's investment higher than the $328,100 total shown on page 1 of the binder.

Without documentary support, Jessup estimates Rockwell's total investment at $170,000. However

Jessup's estimates of specific items paid for by Rockwell yield a considerably higher total, between $215,000 and $230,000. In addition, Rockwell claims to have paid for various items, such as a backhoe, a train, air conditioning for the lounge, and excavation and fill for the train's track bed, all of which Jessup denies.

The burden of proof under 21 U.S.C. § 853(n)(6) falls on petitioners. The absence of receipts, logs or other records, which would normally be maintained in such a business, places petitioners at a considerable disadvantage in satisfying their burden. Jessup cannot counter the government's evidence with anything but oral testimony consisting of rough and inconsistent estimates and self

serving denials. Whether the absence of documentation is due to stupidity, neglect or an intentional effort to mislead, the burden falls on petitioners and they fail to satisfy it.

There is also considerable question concerning Jessup's credibility and his good faith in this matter. Jessup dealt with Rockwell exclusively in large amounts of cash delivered in brown paper bags, yet kept no records and claims that his suspicions were never aroused. It is inconceivable that even the most trusting and naive business partner (neither adjective by the way being applicable to Jessup) would incur considerable expenses and receive varying amounts of cash, all with

business and tax repercussions, without maintaining any records. It is also incredible that anyone could participate in transactions involving unholy amounts of cash, the largest by Jessup's description being $90,000, without having some doubts or suspicions. Jessup's professed innocence in this unusual course of dealing is not credible and casts serious doubt on his veracity on all other matters.

We also note on the issue of credibility that Jessup has been convicted of income tax evasion on two occasions. The studied avoidance of any paper trail in his dealing with Rockwell evidences an intention to continue practices. It is also undisputed that Jessup purchased

several cashier's checks with Rockwell's money in such a manner and for no other purpose than to avoid IRS reporting requirements. It is also clear that Jessup has been unable to produce any business or financial records concerning the Society, although subject to a subpoena for such documents.

For the reasons stated, we conclude that Jessup's testimony is not worthy of credence. While Rockwell is no altar boy, he has little to gain at this point since his property is forfeit and he has already cooperated extensively. Furthermore, the figure of $328,100 is the only figure supported by a credible document, the running tabulation in Rockwell's binder, and we therefore conclude that

Rockwell's investment in Indian Lake Park totals $328,100.

The second question is the scope of Rockwell's interest in the park. Rockwell claims he was investing in the park as a whole and was to be a 50/50 partner in the entire venture. Jessup on the other hand contends that Rockwell's investment and interest were limited to the one acre waterslide site, and therefore the only property subject to forfeiture is Rockwell's 10 year leasehold interest in that one acre site.

Petitioners rely most heavily on the lease. Its terms specifically limit the lessee's interest to a 10 year lease of the one acre waterslide site, and the accompanying memorandum limits the lessee to a 50/50 interest

in the profits from the waterslide alone, and not the park as a whole.

But there are considerable questions concerning this lease. First of all, Rockwell is not identified in the lease. The lessee is Linda Hineman, one of the several names by which Rockwell's female companion is known. Jessup executed the lease on behalf of the Society knowing that the lease concealed the identity of the true investor. Also critical to an understand of the circumstances is the timing of the lease. Although the lease itself is undated, the accompanying memorandum and the time records of counsel who drafted the documents indicate the date to be July, 1984. This was long after Rockwell's investment had begun in earnest and

less than 20 months before Rockwell's first federal indictment. Most importantly, the terms of the lease did not comport with the parties' course of dealings in those prior 10 months.

Petitioners make much of the fact that most of Rockwell's money had gone to improvements for the one acre waterslide site. But significant and costly improvements had been made to other parts of the park and paid for with Rockwell's money. Most notable is a fence with surrounds the entire 16 acre site. While not necessary to the waterslide, which was enclosed by its own fence, it was critical to the function of a park which was to charge for admission. It is also undisputed that Rockwell paid for concrete floors in 1 or 2 buildings, outside the

waterslide site, which had previously been mere shells with dirt floors. Rockwell also claims, and Jessup denies, that he paid for a train, a backhoe, air-conditioning for the bar and excavation and fill for the railroad's roadbed.

More important than the allocation of dollars to particular sites is the relation of the waterslide to the park as a whole. The waterslide was to be the park's focal attraction. Without the slide, Indian Lake Park was just another picnic ground and fishing hole. With it, it would become an attraction to draw paying customers. It is impossible then to divorce the waterslide site from the park as a whole because the value of the two are inextricably intertwined and this

economic reality is consistent with Rockwell's understanding that he was to be an equal partner in the entire venture. It is the only rational explanation for why Rockwell would expend even one unnecessary dollar outside the purported one acre leasehold, as he undeniably did with the large perimeter fence and the concrete floors. It is the only rational explanation for why Rockwell would invest in the park in one year 3 times as much cash as Jessup had invested in eight.

The discrepancy between events and the terms of the lease, the circumstances of its tardy drafting and execution on the eve of Rockwell's indictment, the continuation of the efforts to avoid a paper trail

identifying the investor, and the simple fact that we do not believe Jessup's testimony to be worthy of credence, compel the conclusion that the lease was a sham designed to minimize the apparent scope of Rockwell's involvement. Rockwell was, by virtue of his paying for items not limited to the waterslide site, and by the interdependent character of the park and slide, an investor in the entire venture and not in some discrete portion of it.

Therefore, the entire parcel known as Indian Lake Park, that is roughly that portion circumscribed by the perimeter fence, and all attachments and improvements thereto, is subject to forced sale to recover the amount of drug proceeds invested in

the property, and the costs incurred by the United States Marshal in maintaining it. As we concluded above, Rockwell's total investment was $328,100. This figure must be reduced by $105,000, the approximate amount invested in unassembled waterslide parts which were independently seized. Therefore, the United States is entitled to the forfeiture of $223,100 of the proceeds of the sale of Indian Lake Park, plus Marshal's costs.

Petitioners do not come to this proceeding with clean hands. The nature of Jessup's dealings with Rockwell, the extensive use of large amounts of cash, the studied efforts to avoid a paper trail and to conceal Rockwell's involvement all compel the conclusion that to permit petitioners

to participate equally in the sale proceeds would permit Jessup to profit unjustly from the influx of money he must have known was tainted. Therefore, the United States is to recover first the full sum of $223,100 and Marshal's costs from the sale proceeds, with the balance remaining, if any, to be paid to the petitioner Society.

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal Action No. 85-256
	)	
v.	)	
	)	
ERNEST G. ROCKWELL	)	

ORDER

AND NOW, this 3rd day of April, 1986, upon consideration of the defendant's plea on July 17, 1985, to Count One of the information in the above-captioned case, thereby admitting that he acquired an interest in a parcel of real property known as Indian Lake Park which is traceable to profits obtain as a result of violations of the federal narcotics laws; and

Upon further consideration of the plea agreement between Ernest G. Rockwell and the United States of America dated July 17, 1985, (See Exhibit A attached hereto and incorporated herein) in which Ernest G. Rockwell agreed to forfeit all assets accumulated through his distribution of drugs, including real property; and

Upon further consideration of the trial testimony of Ernest G. Rockwell on October 3, and October 9, 1985, (See pages 98-101 of the October 3, 1985 transcript and pages 23-26 of the October 9, 1985 transcript attached hereto and incorporated herein as Exhibits B and C) at the trial of United States of America v. Hilmer Sandini, et al., Criminal No. 85-150 and 85-175, in which Ernest G. Rockwell

testified under oath that he invested $357,000.00 of narcotics proceeds in the development and improvement of the real property known as Indian Lake Park, and

Upon further consideration of the deed for said real property known as Indian Lake Park (See Exhibit D attached hereto and incorporated herein), which describes said real property;

It is hereby ordered, in accordance with the dictates of 21 U.S.C. §853(a), that Ernest G. Rockwell, shall forfeit all right and interest in the real property known as Indian Lake Park to the United States;

It is further ordered that the United States marshal for the Western District of Pennsylvania shall seize

said real property and retain the same pending disposition by the Attorney General or further order of this Court.

It is further ordered that, pursuant to 21 U.S.C. §853(n)(1), the United States shall publish notice of this order and of its intent to dispose of said real property in such manner as the Attorney General may direct in the Pittsburgh Press and Pittsburgh Legal Journal. The United States shall also serve written notice of its intent to dispose of the real property on any person alleged to have an interest in the property;

It is further ordered that if no petition for hearing is filed by any third party with this Court within thirty (30) days after publication or receipt of the notice as required in 21

U.S.C. §853(n)(2), the United States may dispose of the real property in accordance with law; however, if a petition is filed, this Court shall hold a hearing to determine the validity of the third-party interest.

Gerald J. Weber
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3106

UNITED STATES OF AMERICA

v.

ERNEST G. ROCKWELL,

HARRY JESSUP,

Appellant

Appeal from the United States
District Court for the Western
District of Pennsylvania
(D.C. Crim. No. 85-156)
District Judge: Hon. Gerald J. Weber

Argued July 27, 1988

Before: GIBBONS, Chief Judge, SEITZ and HUTCHINSON, Circuit Judges.

JUDGEMENT ORDER

Harry Jessup, the President and majority shareholder of Westmoreland Recreation Society, Inc., appeals from an order of forfeiture entered January 21, 1988. Jessup concedes that he has no interest in the property forfeited as an individual. Accordingly, as to him, the order is affirmed.

Jessup requests that we construe the notice of appeal as indicating an intention to appeal by Westmoreland Recreation Society, INc., which does not have some interest in the property forfeited. This we may not do under the Supreme Court's recent decision in Torres v. Oakland Scavenger

Co., 56 U.S.L.W. 4740 (June 24, 1988). Therefore, we lack jurisdiction over any claims by Westmoreland Recreation Society, Inc. and dismiss its purported appeal.

Costs taxed against appellant, Harry Jessup.

BY THE COURT,

John Gibbons
Circuit Judge

Attest:
M. Elizabeth Ferguson
Chief Deputy Clerk

July 28, 1988

Costs taxed in favor of appellee as follows:

Brief..... $182.00

Certified as a true copy and issued in lieu of a formal mandate on August 19, 1988.

Test:
M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE

I, Robert L. Potter, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served, via First Class Mail, on this date on the following persons:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Sally Mvros, Clerk
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1790

United States Attorney for
the Western District of
Pennsylvania
6th Floor
U.S. Courthouse & P.O.
Pittsburgh, PA 15219

_____
Robert L. Potter

CERTIFICATE OF SERVICE

I, Robert L. Potter, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served, via First Class Mail, on this date on the following persons:

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United States Attorney for
the Western District of
Pennsylvania
6th Floor
U.S. Courthouse & P.O.
Pittsburgh, PA 15219

_____
Robert L. Potter

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-521

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY JESSUP AND WESTMORELAND RECREATION SOCIETY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

9 pp

QUESTION PRESENTED

Whether a pro se litigant's notice of appeal, filed in his name only, was sufficient under Fed. R. App. P. 3(c) to include as a party to the appeal a corporation that he controlled.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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HARRY JESSUP AND WESTMORELAND RECREATION SOCIETY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1988. The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 17, 1985, Ernest Rockwell pleaded guilty to one count of tax evasion and one count of engaging in a

continuing criminal narcotics enterprise (Pet. App. A4-A5). As part of the plea agreement Rockwell forfeited any interest in property obtained with the proceeds of his drug trafficking activities, including all right, title, and interest in Indian Lake Park, a mountain site in Westmoreland County, Pennsylvania (*ibid.*). See 21 U.S.C. (Supp. IV) 853. Thereafter, the district court ordered (Pet. App. A31-A35) that the Indian Lake Park property be seized.

2. Petitioners Jessup and the Westmoreland Recreation Society, Inc., a non-profit corporation of which Jessup was the president and principal shareholder, petitioned to vacate the seizure order, asserting that they had right, title, and interest in the seized property superior to Rockwell's. After a hearing, the district court denied the petition and entered an order of forfeiture (Pet. App. A1-A30). The order directed that Indian Lake Park be sold (*id.* at A28-A29); that the government recover $223,100 of the proceeds of the sale, the amount of illicit funds Rockwell had spent improving the site (*id.* at A29); and that Westmoreland Recreation receive any balance remaining from the sale proceeds (*id.* at A30).

3. Petitioner Jessup took a pro se appeal from the order of forfeiture; Westmoreland Recreation did not appeal. The court of appeals then affirmed the forfeiture order as to Jessup, since Jessup had no interest in the forfeited property as an individual (Pet. App. B2). Contrary to Jessup's request, the court declined (*id.* at B2-B3) to construe his notice of appeal as one filed by Westmoreland Recreation, which did have an interest in the property, since Federal Rule of Appellate Procedure 3(c) requires that a notice of appeal "shall specify the party or parties taking the appeal." See *Torres* v. *Oakland Scavenger Co.*, No. 86-1845 (June 24, 1988).

ARGUMENT

Petitioners contend (Pet. 21) that the court of appeals erred in refusing to view petitioner Jessup's filing as a notice of appeal by Westmoreland Recreation.

1. The court of appeals was correct in dismissing Westmoreland Recreation's "purported appeal" (Pet. App. B3). As this Court held in *Torres*, slip op. 2-3, "[t]he failure to name a party in a notice of appeal [as required by Fed. R. App. P. 3(c)] * * * constitutes a failure of that party to appeal." Such a failure "is more than [an] excusable 'informality,' " it is a jurisdictional defect that means the unnamed party is not before the court. *Torres*, slip op. 3, 6. Thus, like the *Torres* plaintiff's argument that the typographical error omitting his name from the notice of appeal was harmless error, petitioners' argument that the failure to comply with Rule 3(c) should be excused because it did not cause confusion to the court or to the government (Pet. App. 21-23), or because both parties briefed the forfeiture issue on the merits (*id.* at 22-23), "misunderstands the nature of a jurisdictional requirement" (*Torres*, slip op. 5 n.3). Although a court may suspend the provisions of other rules of procedure "for * * * good cause shown" (Fed. R. App. P. 2), a court cannot excuse noncompliance with the specificity requirement of Fed. R. App. P. 3(c) because, like other requirements of that rule and Fed. R. App. P. 4, that requirement defines the court's "jurisdictional threshold" (slip op. 3). See *Torres*, slip op. 5 n.3 ("a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court").

2. *Houston* v. *Lack*, No. 87-5428 (June 24, 1988), and *Foman* v. *Davis*, 371 U.S. 178 (1962), do not provide a means of avoiding the jurisdictional bar to Westmoreland Recreation's appeal. In *Lack*, this Court held that notices of appeal filed by pro se prisoners are not subject

to the general rule that a notice of appeal in a civil case is "filed" when it is received by a court clerk. The Court in *Lack* recognized (slip op. 5) that "[u]nskilled in law, unaided by counsel, and unable to leave the prison, [the pro se prisoner's] control over the processing of his notice necessarily ceases as soon as he hands it over * * * [to] the prison authorities." The Court therefore held that a pro se prisoner's notice of appeal should be deemed filed the moment he or she delivers it to officials within the prison designated to receive prisoners' outgoing mail.

This case is very different from *Lack*. First, this Court in *Lack* held (slip op. 6) that the Rules of Appellate Procedure "are not dispositive" on the question whether a pro se prisoner's notice of appeal is filed when the notice is delivered to the prison authorities or at some later time. See slip op. 5-6 (Fed. R. App. P. 3(a), 4(a)(1) specify required destination but not timing of filing). By contrast, the Rules of Appellate Procedure are definite on the question at issue here, whether the court of appeals had jurisdiction over a litigant not specified in the notice of appeal. See Fed. R. App. P. 3(c) (notice of appeal "shall specify the party or parties taking the appeal"). Second, the decision in *Lack* relied to a considerable extent on the special situation of the pro se prisoner, who, among other things, "has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay" (slip op. 4). Petitioner Jessup can hardly argue that, as a pro se litigant, he had a similar lack of ability to control the identification of the parties to the appeal.[1]

---

[1] The same factors differentiate this case from *Fallen* v. *United States*, 378 U.S. 139 (1964), in which this Court held that the date on which a pro se prisoner delivers his criminal notice of appeal to prison authorities is, for procedural purposes, the date of the filing of the appeal.

In *Foman* v. *Davis, supra,* the Court addressed a separate provision of Rule 3(c) that requires a notice of appeal to "designate the judgment, order or part thereof appealed from." The plaintiff in *Foman* had filed two notices of appeal, one that was premature because of motions he had pending before the district court, and a second that failed to designate the underlying dismissal as the judgment being appealed. The court of appeals refused to hear Foman's appeal. This Court reversed, holding that the second notice of appeal was "an effective, although inept, attempt to appeal from the judgment sought to be vacated." 371 U.S. at 181.

As this Court explained in *Torres* (slip op. 5), *Foman* stands for the principle that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." But here, as in *Torres,* petitioners "failed to comply with the specificity requirement of Rule 3(c), even liberally construed" (*ibid.*). Petitioners did not file the functional equivalent of a notice of appeal naming Westmoreland Recreation as a party, however unartfully; Westmoreland Recreation simply was not named.[2]

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[2] Petitioners' reliance on *NAACP* v. *Alabama,* 357 U.S. 449 (1958), is misplaced. The Court held there that the NAACP had standing to assert on behalf of its members a claim that they were constitutionally protected from being compelled by the State to disclose their membership in the Association. The Court reasoned (*id.* at 459) that the principle that parties must rely on constitutional rights personal to themselves is "not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." Petitioner does not and cannot explain why Westmoreland Recreation's rights could not be vindicated by an appeal taken in its

This Court in *Torres* recognized (slip op. 6) that "construing Rule 3(c) as a jurisdictional prerequisite" could lead to "harsh result[s]." As the Court found there, however, the "implacable" terms of the Rule were "imposed by the legislature and not by the judicial process" (quoting *Schiavone* v. *Fortune,* 477 U.S. 21, 31 (1986)). The court of appeals properly applied *Torres* when it dismissed this appeal. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

NOVEMBER 1988

---

own name. Indeed, petitioner elsewhere concedes (Pet. 18) that his failure to take the appeal in the name of Westmoreland Recreation was simply a "mistake."

U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60789